84-585

No. 84- .

Office-Supreme Court, U.S.
FILED
OCT 10 1984
ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH LOMBARDO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

ALAN M. DERSHOWITZ,
Counsel of Record,
232 Brattle Street,
Cambridge, Massachusetts 02138.
(617) 661-1965

Of Counsel:
LAURA J. HANFT,
NATHAN Z. DERSHOWITZ,
VICTORIA B. EIGER,
JUDITH A. HALPRIN.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

34pp

Questions Presented.

1. Did the court below err in holding that knowing participation in a conspiracy to bribe a United States Senator was sufficiently established by evidence of the defendant's "presence plus suspicious circumstances," where there was no evidence that Petitioner knew of the conspirators' intent to influence the Senator's official acts and where five Circuits have rejected the "presence plus suspicious circumstances" test as improper?

2. Did the court below err in holding that the subjective standard of recklessness developed in the First Amendment libel context applies to a claim under *Franks* v. *Delaware*?

3. Did the court below err in holding that the plain view doctrine permitted the seizure, analysis, and introduction of electronically intercepted conversations which were outside the scope of a wiretap warrant and which were not 'immediately incriminatory'?

4. Did the court below err in upholding the validity of a wiretap extension application which did not contain the statement of results required by 18 U.S.C. § 2518(1)?

Parties Below.

Other parties to the proceeding in the court below were Roy L. Williams, Thomas F. O'Malley, and Andrew G. Massa. Petitioner hereby adopts the arguments made in the petitions for a Writ of Certiorari of co-defendants.

Table of Contents.

Opinions below 1

Jurisdiction 2

Constitutional and statutory provisions involved 2

Statement of the case 4

I. Introduction 4

II. Facts 4

Reasons for granting the writ 8

I. The court's holding that knowing participation in a conspiracy is sufficiently established by evidence of the defendant's "presence plus suspicious circumstances," conflicts with the rulings of five other circuits, effectively eliminates an essential element of the crime, and violates the constitution's requirement that a conviction be had only on proof beyond a reasonable doubt of each element of the crime charged 8

II. The court's holding that the subjective standard of recklessness developed in the First Amendment libel context applies to a claim under *Franks* v. *Delaware* cannot be squared with constitutional and statutory principles, conflicts with decisions of other circuits and with the reasoning of a recent decision of this court 15

III. The court below misinterpreted this court's decisions defining the parameters of the "plain view" doctrine 23

IV. The court of appeals erred in upholding the March 1 extension application despite the application's failure to include a statement of results as required by 18 U.S.C. § 2518(1)(f) 25

Conclusion 26

Table of Authorities Cited.

CASES.

Bose Corp. v. Consumers Union, 104 S.Ct. 1949 (1984) 20n

Franks v. Delaware, 438 U.S. 154 (1978) 4, 15, 16 17, 18 et seq.

Illinois v. Andreas, 103 S.Ct. 3319 (1983) 23, 24

In re Winship, 397 U.S. 358 (1970) 15

Jackson v. Virginia, 443 U.S. 307 (1979) 15

New York Times v. Sullivan, 376 U.S. 254 (1964) 18, 20n

Roth v. United States, 354 U.S. 476 (1957) 18n

Sandstrom v. Montana, 442 U.S. 510 (1979) 11

Smith v. California, 361 U.S. 147 (1959) 17n, 18n

St. Amant v. Thompson, 390 U.S. 727 (1968) 17, 18, 20

Sunstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977) 21n

Texas v. Brown, 460 U.S. 730 (1983) 23, 24

United States v. Boothman, 654 F.2d 700 (10th Cir. 1981) 14

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) 8, 9, 10n, 12n

United States v. Bulman, 667 F.2d 1374 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982) 14

United States v. Clark, 531 F.2d 928 (8th Cir. 1976) 24

United States v. Cooper, 567 F.2d 252 (3d Cir. 1977) 14, 15

United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980) 19n

United States v. Dalzotto, 603 F.2d 642 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979) 10

United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979) 16

United States v. Dunn, 564 F.2d 348 (9th Cir. 1977) 9, 14

United States v. Ganter, 436 F.2d 364 (7th Cir. 1970) 20n

United States v. Giordano, 416 U.S. 505 (1974) 19, 25, 26

United States v. Gray, 484 F.2d 352 (6th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974) 24

United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983) 14

United States v. Holmes, 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972) 10

United States v. Johnson, 621 F.2d 1073 (10th Cir. 1980) 9

United States v. Laughman, 618 F.2d 1067 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980) 14

United States v. Leon, 104 S.Ct. 3405 (1984) 16, 20, 21

United States v. Malatesta, 590 F.2d 1379 (5th Cir.) (*en banc*), *cert. denied*, 440 U.S. 902 (1979) 14

United States v. Myers, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983) 8, 9, 13

United States v. Namer, 680 F.2d 1088 (5th Cir. 1982) 16, 21, 22

United States v. Rackley, 724 F.2d 1463 (11th Cir. 1984) 14

United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983) 14

United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983) 14

United States v. Spock, 416 F.2d 165 (1st Cir. 1969) 13n

United States v. Strand, 574 F.2d 993 (9th Cir. 1978) 9, 10n

United States v. Wright, 667 F.2d 793 (9th Cir. 1982) 24

STATUTES.

United States Constitution
First Amendment 4, 7, 17, 18, 19 et seq.
Fourth Amendment 2, 4, 16, 19, 20, 21, 24
Fifth Amendment 2, 15

18 U.S.C. § 201 10n

18 U.S.C. § 201(b) 3, 9n
18 U.S.C. § 201(b)(1) 3, 9
18 U.S.C. §§ 201(c) and (d) 9n
18 U.S.C. § 201(f) 9n
18 U.S.C. § 201(g) 10n
18 U.S.C. §§ 2510-2520 19n, 20, 26
18 U.S.C. § 2516(1) 19n
18 U.S.C. § 2518(1) 3, 19n
18 U.S.C. § 2518(1)(f) 3, 6, 25
18 U.S.C. § 2518(3) 19n
18 U.S.C. § 2518(4) 19n
18 U.S.C. § 2518(5) 19n
18 U.S.C. § 2518(6) 19n
18 U.S.C. § 2518(10)(a) 19n
28 U.S.C. § 1254(1) 2

MISCELLANEOUS.

3 Wright, Federal Practice & Procedure, Criminal 2d § 678 (1982) 20n

No. 84- .

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH LOMBARDO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Opinions Below.

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 737 F.2d 594 (7th Cir. 1984) and is reproduced at page 1a of the Appendix to the petition for a Writ of Certiorari of Petitioner's co-defendant Roy L. Williams. Williams' petition was filed in this case on August 16, 1984, No. 84-256 and Petitioner hereby adopts its Appendix. The Opinion of the Court of Appeals denying rehearing is unreported, and is reproduced at page 42a of the Appendix to Roy L. Williams' petition. The Opinion of the District Court is reported at 542 F.Supp. 345 (N.D. Ill. 1982) and is reproduced at page 44a of the Appendix to Roy L. Williams' petition.

All references in this petition to opinions of the courts below refer to page numbers in the Appendix to the Williams petition.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 8, 1984. Rehearing was denied on July 12, 1984. Petitioner moved for an extension of time within which to file his petition for a Writ of Certiorari, and by order dated August 24, 1984, this Court extended the time within which to file the Petition to October 10, 1984. This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U S.C. § 201(b) provides:

§ 201. Bribery of public officials and witnesses

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,

18 U.S.C. § 2518(1), provides, in pertinent part:

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

Statement of the Case.

I. *Introduction.*

This is the first case, to Petitioner's knowledge, where a defendant has been convicted of conspiracy to bribe a Senator where there is no evidence that the defendant knew that the thing of value which was being offered to the Senator was in exchange for a specific *quid pro quo*. To fill this evidentiary gap — indeed this absence of a required element of the crime of bribery — the Seventh Circuit employed an erroneous evidentiary standard rejected by five other circuits. The result has been the conviction of a man who is innocent of the crime charged. The Court of Appeals also erroneously applied the First Amendment libel test for "reckless disregard for truth" in the wholly inapplicable context of the Fourth Amendment test for determining whether a government agent's false statements to a magistrate meet the *Franks* v. *Delaware* standard. The resulting tragedy of the lower court's use of both these erroneous standards is that Petitioner has been sentenced to fifteen years of imprisonment on the basis of a far lower standard of knowledge than that imposed on a government agent who submitted a false affidavit. Because the standard of knowledge required for conviction of a serious felony must be higher than that required for the invocation of a prophylactic rule designed to protect constitutional values, there is something seriously askew in the Court of Appeals' selection of standards for review in this case.

II. *Facts.*

Petitioner and four others were charged with conspiracy to bribe a United States Senator, interstate travel to promote the bribery, and wire fraud.[1] Essentially, the government charged that defendants agreed to assist Senator Howard Cannon to purchase certain real estate as an inducement for the Senator's promise to oppose legislation to deregulate the trucking industry.

[1] The other defendants were Allen Dorfman (who was killed after trial and prior to sentencing), Roy L. Williams, Andrew G. Massa and Thomas F. O'Malley. Williams was an international vice president of the Teamsters Union; O'Malley and Massa were current and former trustees of the Teamsters Pension Fund; Dorfman's company insured many Pension Fund assets. Petitioner was not shown to have any connection to the Teamsters or the Teamsters Pension Fund.

Defendants' trial lasted almost two months. The government introduced hundreds of taped conversations obtained through fourteen months of continuous electronic surveillance which resulted in the recording of over 20,000 hours of conversations. Much of the testimony focused on a January 10, 1979 meeting between Senator Cannon and several others (not including Petitioner Lombardo) at which the agreement was allegedly reached, on subsequent conversations and meetings regarding the proposed legislation, and on a series of bids made on the real estate, known as the "Wonderworld" property.

The government has conceded that the only evidence connecting Petitioner Lombardo to the alleged conspiracy was five brief taped conversations. Petitioner was not present at the January 10th meeting or at any other meetings. The five conversations contain no reference to any attempt to influence the Senator, no reference to the January meeting, and no reference to deregulation of the trucking industry or to any pending legislation. At most, the evidence reflected that Petitioner suggested to Allen Dorfman two people who might be able to negotiate successfully with Allen Glick, a bidder on the Wonderworld property, to withdraw his bid. Petitioner neither arranged nor attended the meeting with Glick. All of the five conversations introduced against Petitioner are consistent with his innocence of all charges.

Despite the paucity of the evidence against Petitioner, he was convicted on eleven counts and sentenced to a prison term of fifteen years.

On appeal, Petitioner argued that there was insufficient evidence to support his conviction because there was absolutely no evidence that he knew the illegal nature or goal of the conspiracy, which was to obtain the Senator's opposition to deregulation legislation in exchange for assistance with Wonderworld. The Court of Appeals agreed that the government must prove such knowledge, but held that knowledge, can be inferred from minimal evidence:

> the quantum of proof that the government must produce is not great; presence has been sufficient evidence of knowing participation in a conspiracy when there were suspicious circumstances, and the existence of the conspiracy was already established.

(A. 36a.)[2]

[2] All page references are to page numbers in the Appendix to Roy L. Williams' Petition for a Writ of Certiorari, filed in this case August 16, 1984. Petitioner hereby adopts the Williams appendix.

Applying this "presence plus suspicious circumstances" test, the court found that there was sufficient evidence to support an inference that Petitioner knew of the plan to offer something of value to the Senator because other defendants solicited and relied on Petitioner's advice and because Petitioner referred to "the Cannon deal" — a perfectly innocent term — in a subsequent conversation dealing with the management of the Teamsters Pension Fund's assets (A. 36a-37a). The court could not, and did not, advert to any evidence indicating that Petitioner was aware of the conspiracy's intent to influence the Senator's official actions regarding deregulation of the trucking industry — the only fact that would convert otherwise innocent conduct into a felony.

Other issues on appeal concerned the District Court's refusal to suppress the results of electronic surveillance conducted pursuant to a March 1, 1979 wiretap extension authorization. The March 1 wiretap application, which named Petitioner as a party whose conversations were to be intercepted, sought a 30-day extension of a January 29 order authorizing wiretaps on all telephones at Allen Dorfman's place of business. In its initial application, the government had asserted that the wiretap was necessary to its investigation of Dorfman's purported hidden interests in Nevada casinos. The March 1 extension application and affidavit repeated the "hidden interest" allegations and, in addition, alleged that the initial wiretap had intercepted conversations which "concerned the promotion and management of hidden and unlawful interests in the Aladdin hotel-casino." The March 1 extension application did not contain a statement of results thus far obtained or an explanation for the failure to obtain results, although such a statement is required by 18 U.S.C. § 2518(1)(f). The judge granted the extension order. At petitioner's trial, fourteen conversations intercepted and recorded during this period were introduced against him.

In fact, as both the District Court and the Court of Appeals found, as of March 1, no conversations substantiating any "hidden interest" allegations had been intercepted (A. 13a, 65a). The "Aladdin allegations," which provided the sole basis for a finding of probable cause, also "proved to be false"

(A. 10a, 11a). As of March 1, Special Agent Peter Wacks, who drafted and signed the affidavit, *knew* that allegedly ambiguous conversations about real estate bids did not concern the Aladdin but "some 'golf course' property," eventually determined to be Wonderworld (A. 13a).

Prior to trial, Petitioner and his co-defendants moved to suppress on the ground that the March 1 wiretap extension application and affidavit failed to include the required statement of results, and contained material misstatements made intentionally or with reckless disregard for the truth. A suppression hearing was held. The District Court held that although the application did not contain a statement of results, suppression was not required because the application contained an independent basis for probable cause (A. 78a-81a). The District Court also held that, although the affidavit did contain material misstatements, suppression was not required because the statements had not been made intentionally or recklessly (A. 85a-90a). In so concluding, the District Court relied on case law, developed in First Amendment libel cases, which construed the phrase "reckless disregard for truth" to require a showing of subjective bad faith, that is, that the speaker "in fact entertained serious doubts as to the truth of his allegations" (A. 67a-69a).

On appeal, Petitioner objected to the application of the First Amendment standard in a wiretap warrant case. The Court of Appeals found that the challenged statement was both false and material, but agreed with the District Court that the First Amendment standard was applicable and that under that subjective test, recklessness had not been shown (A. 11a-13a). Petitioner and his co-defendants also objected to the refusal to suppress despite the failure to include a statement of results. The Court of Appeals agreed with the District Court that because the wiretap application would have provided the basis for an original grant of authority, suppression was not required for failure to include a statement of results (A. 10a). In addition, Petitioner and his co-defendants argued that 33 conversations introduced at Petitioner's trial should have been suppressed because they were unrelated to the crimes specified in the

wiretap authorization and because they were not immediately incriminatory, and were therefore not within "plain view." The Court of Appeals found that the plain view doctrine was probably inapplicable to electronic surveillance, but that the government's seizure, analysis and introduction of the conversations were permissible under that doctrine (A. 15a-19a).

Reasons for Granting the Writ.

I. THE COURT'S HOLDING THAT KNOWING PARTICIPATION IN A CONSPIRACY IS SUFFICIENTLY ESTABLISHED BY EVIDENCE OF THE DEFENDANT'S "PRESENCE PLUS SUSPICIOUS CIRCUMSTANCES," CONFLICTS WITH THE RULINGS OF FIVE OTHER CIRCUITS, EFFECTIVELY ELIMINATES AN ESSENTIAL ELEMENT OF THE CRIME, AND VIOLATES THE CONSTITUTION'S REQUIREMENT THAT A CONVICTION BE HAD ONLY ON PROOF BEYOND A REASONABLE DOUBT OF EACH ELEMENT OF THE CRIME CHARGED.

The Court below employed an improper legal standard and thus erred in ruling that there was sufficient evidence to sustain the conviction of Petitioner Lombardo. Its decision conflicts with decisions of other Circuits holding that bribery prosecutions require clear evidence of specific knowledge of the official act to be influenced. *See, e.g. United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983); *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974).

The decision below also utilizes the "presence plus suspicious circumstances" test to measure the sufficiency of the evidence connecting Petitioner to the conspiracy. Under this test, once the conspiracy has been established, only "slight evidence" is necessary to connect an alleged conspirator to it. At least five Circuits have explicitly rejected this test, holding

that, while a "slight *connection*" to the conspiracy may be sufficient, the government must introduce evidence demonstrating that connection beyond a reasonable doubt. "Thus, the word 'slight' properly modifies 'connection' and not 'evidence.'" *United States* v. *Dunn*, 564 F.2d 348, 357 (9th Cir. 1977). By adopting the "presence plus suspicious circumstances" test, the decision makes a nullity of the Constitutional requirement, articulated in numerous decisions of this Court, that all criminal convictions be based on proof beyond a reasonable doubt — not just slight evidence — of each element of the crime, including the element of knowledge.

It is axiomatic that to convict a defendant of conspiracy, the government must connect the defendant to the conspiracy by proving that he knew its essential nature.[3] The "essential nature" of a conspiracy to bribe a U.S. Senator is the corrupt intent to influence an official act. 18 U.S.C. § 201(b)(1). Under the bribery statute, the knowledge requirement is critical: "the evidence must show 'specific knowledge of a definite official act' for which payment is made." *United States* v. *Myers*, 692 F.2d at 845, citing *United States* v. *Brewster*, 506 F.2d at 81. It is not enough knowingly to offer "something of value" to a Senator. Defendant must intend that the bribe be the prime mover or producer of the official act; indeed, "it is this element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute. . ." *United States* v. *Strand*, 574 F.2d 993, 995 (9th Cir. 1978). *See also United States* v. *Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) ("money must be given [not just with] generalized hope of ultimate benefit" but with "the intent and design to influence official action in exchange for the donation.")[4]

---

[3] As the court below properly noted, "[a] person is not a co-conspirator, of course, if he is unaware of the 'essential nature' of the conspiracy" (A. 35a).

[4] Under 18 U.S.C. §§ 201(b), (c) and (d), the bribery portions of the statute, the thing of value must be given or accepted "corruptly" and "with intent to influence" or "in return for" being influenced. Under 18 U.S.C. § 201(f) and

In this case, the alleged conspiracy consisted of the offer of something of value to the Senator — assistance to his homeowners group in acquiring the Wonderworld property — *in exchange for a quid pro quo* — the Senator's opposition to statutory deregulation of the trucking industry. The court below rejected Petitioner's claim that there was insufficient evidence of knowledge despite the complete absence of any evidence suggesting that Petitioner was aware of the *quid pro quo*.

In rejecting Petitioner's challenge to the sufficiency of the evidence connecting him with the conspiracy, the court below stated:

> [T]he quantum of proof that the government must produce is not great; "[p]resence has been sufficient evidence of knowing participation in a conspiracy when there were suspicious circumstances, and the existence of the conspiracy was already established." *United States* v. *Dalzotto*, 603 F.2d 642, 645 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979); *see United States* v. *Holmes*, 452 U.S. 249, 255-56 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972).

(A. 36a).

Applying this test, the court analyzed the evidence, and concluded that Petitioner knew of the plan to assist the Senator's

---

(g), the gratuity portions, no specific intent is required. It is sufficient that the thing be given or accepted "otherwise than as provided by law for the proper discharge of official duty." *See United States* v. *Strand*, 574 F.2d at 995 n.2. A bribery conviction carries a penalty of up to 15 years in prison; an illegal gratuity conviction up to two years. 18 U.S.C. § 201.

As the District of Columbia Circuit noted in *United States* v. *Brewster*, 506 F.2d at 78, the statute is not "a model of clarity and nicely drawn distinctions." It "does cause great difficulty for a trial judge" who must "draw a tripartite distinction between conduct with the defined intent to constitute an offense under the bribery section (c), conduct with the requisite intent to constitute an offense under the gratuity section (g), and conduct with an intent which constitutes no offense at all," *id.* at 78-79. Drawing this "tripartite" line is a delicate task, and one which turns solely on distinctions between levels of knowledge and intent.

group to purchase the Wonderworld property and thus *to offer a thing of value to the Senator* (A. 37a).

However, the Court could not, and did not, advert to *any* evidence showing that Petitioner was aware of the conspirators' intention to obtain a legislative *quid pro quo* for their offer. No such evidence was introduced at trial, despite the fact that such knowledge is precisely what distinguishes innocent from guilty conduct under the bribery statute. As if evidence of such knowledge were unnecessary, the court held that the jury could *infer* that Petitioner knew that "the favor was intended to influence an official act" merely "from the secretive nature of the operation (A. 37a).[5] This "inference" is wholly improper. Where, as here, knowledge or intent is an essential element of the crime, it may not be presumed or inferred from proof of "additional facts not themselves establishing the element of intent." *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979). Moreover, the "operation" in question of course, was the attempt to assist with the Senator's acquisition of Wonderworld, and an attempt to assist done in secret does not mean that the assistance is necessarily part of an illegal scheme, and certainly not the particular illegal scheme charged here.[6] Otherwise, any

---

[5] To support its conclusion, the court noted vaguely that "a co-conspirator need not know the details, . . . or every objective of the conspiracy" so long as he knows "the kind of criminal conduct . . . in fact contemplated" (A. 37a). Yet the court did not point to any evidence linking the defendant to any "criminal conduct contemplated" regarding deregulation. As if aware that a critical link was missing, the court added in a footnote that "there was sufficient evidence, in any event, to support the jury finding that Lombardo was aware of the intent of the co-conspirators to influence Senator Cannon's actions on deregulation" (A. 37a n.14). The footnote neither noted nor described *any* such evidence, and there was none. The mere assertion, without more, that such evidence exists, is of course an inadequate response to petitioner's claim of insufficiency.

[6] Petitioner was charged with conspiracy to bribe, not to give an illegal gratuity. The bribery section requires proof of "corrupt intent." See footnote 4, *supra*. If he were, in fact, guilty of the lesser offense of giving an illegal gratuity, obviously there would be a reason to keep the transaction secret. Thus, the "secretive nature of the operation" certainly gives rise to no proper inference that Petitioner was guilty of the felonious conspiracy charged.

act of charity, generosity, or selflessness done quietly, without fanfare or publicity, would be suspect, as would an act of political influence peddling that was entirely lawful, if not necessarily laudable.

The court's willingness to uphold Petitioner's conviction and fifteen year sentence despite the lack of evidence that he knew of the *quid pro quo* requested in exchange for assistance with Wonderworld, poses the clear danger that Petitioner has been, and future defendants may be, convicted for engaging in conduct which is not only legitimate, but laudable. It is of course legal to use one's business connections to help a group of homeowners (even one headed by a Senator) to purchase a property to prevent it from becoming a high-rise development. It is also legal to wish to remain anonymous while doing so, yet that is all the evidence against Petitioner shows. The thing which distinguishes such conduct from illegal bribery is the presence or absence of an intent to influence the Senator's official actions in exchange for the help, and there was no evidence here of such an intent on the part of Petitioner Lombardo, or of knowledge on his part that others had such an intent.[7]

---

[7] As the District of Columbia Circuit recognized, "Every campaign contribution is given to an elected public official probably because the giver supports the acts done *or to be done* by the elected official." *United States* v. *Brewster*, 506 F.2d at 73 n.26 (emphasis supplied). If however, the contribution is made *in consideration of* official support for specific legislation, it is an illegal gratuity. If the contribution is made *in exchange for* official support for specific legislation, it is an illegal bribe, because the contribution does not merely reward the official act but is the prime mover in producing it. *Id.* at 80-83. Thus, contributions can be made with the general expectation of future official support, but not as an inducement or reward for *specific conduct*.

Our political system depends on financial contributions by groups and individuals. Giving "something of value" to elected officials whose views are in accord with the giver's is both protected political expression and a necessary source of campaign support for the official. In this case, the Court of Appeals upheld Petitioner's conviction solely because he knew that "something of value" was given to the Senator. If this were enough to sustain a conviction, then every political contributor would be liable to prosecution. "No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's act crosses the line between guilt and innocence." *Id.* at 81. Yet it is precisely that "specific knowledge" which is missing here.

Unless courts are vigilant in requiring evidence of such intent, defendants may be convicted for wholly innocent acts.[8] Consider for example, two farmers who illegally agree with a Senator to contribute something of value to his campaign *in exchange for* his support for increased farm subsidies. The thing of value is funneled to the Senator through a farmers' special interest PAC. Under the theory of the court below, the officers of the PAC could be liable for bribery because they knew that the PAC gave something of value to the Senator, although they had no knowledge whatsoever of the individual contributors' intent to obtain specific legislative support in exchange for it. Petitioner's position is like that of the PAC officers: he *knew* he was assisting the Senator to acquire Wonderworld but he *did not know* that the conspirators intended to obtain specific legislative support from the Senator in exchange for the assistance.

In a recent "Abscam" case, where a defendant Congressman argued that "there was an undue risk that the jury might convict him simply for engaging in the normal congressional activities of meeting with people who might invest in his district and advising people on immigration matters," the Second Circuit held that the risk was properly dealt with and eliminated when the court "focused the jury's attention squarely on whether Murphy *knew*" that he was accepting money for his otherwise legal assistance. *United States* v. *Myers*, 692 F.2d at 845 (emphasis added).[9]

In this case, the Court of Appeals not only failed to focus on the critical element of knowledge, but, by adopting the "presence plus suspicious circumstances" test, it effectively

---

[8] The *quid pro quo*-knowledge requirement in the bribery statute is especially important in prosecutions for conspiracy to bribe. Without strict enforcement of the knowledge requirement, any person who joins in any *legal* act performed by the conspirators may be liable as a conspirator, whether or not he knows of the conspiracy's existence.

[9] *See also United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969) (specific intent to further illegal aspects of agreement may not be inferred from fact that defendant participated in drafting legal portions of document).

eliminated the knowledge element altogether. Under that test, once the government has introduced proof beyond a reasonable doubt that the conspiracy existed, it need not prove beyond a reasonable doubt that the defendant knew of the conspiracy or was connected to it. Instead, the government need only introduce "slight evidence" of the defendant's connection.

The "slight evidence" rule is used by the Sixth, Eighth, and Tenth Circuits. *See United States* v. *Hamilton*, 689 F.2d 1262, 1275 (6th Cir. 1982); *cert. denied*, 459 U.S. 1117 (1983); *United States* v. *Richmond*, 700 F.2d 1183, 1190 (8th Cir. 1983); *United States* v. *Boothman*, 654 F.2d 700, 703 (10th Cir. 1981).

The rule has been rejected by the Third, Fourth, Fifth, Ninth, and Eleventh Circuits. *See United States* v. *Cooper*, 567 F.2d 252, 253 (3d Cir. 1977); *United States* v. *Laughman*, 618 F.2d 1067, 1076 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980); *United States* v. *Malatesta*, 590 F.2d 1379, 1381-82 (5th Cir.) (*en banc*), *cert. denied*, 440 U.S. 962 (1979); *United States* v. *Spetz*, 721 F.2d 1457, 1478 (9th Cir. 1983); *United States* v. *Dunn*, 564 F.2d 348, 357 (9th Cir. 1977); *United States* v. *Bulman*, 667 F.2d 1374, 1377-78 & 1377 n.2 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982).

Those circuits *rejecting* the rule require that, "[t]o convict on [a] conspiracy count, proof *beyond a reasonable doubt* must show that the conspiracy existed, that the accused knew of it, and that, with knowledge, the accused voluntarily became a part of it." *United States* v. *Rackley*, 724 F.2d 1463, 1470 (11th Cir. 1984) (emphasis added). As the Third Circuit stated in *Cooper*: "[Cases referring to 'slight evidence'] cannot be understood to establish the novel rule that the prosecution in a conspiracy case is relieved of the burden of proving every element of the offense beyond a reasonable doubt. Clearly, it would be reversible error to charge a jury that, once the government has shown the existence of a conspiracy, it may connect a particular defendant to it by 'slight evidence' rather than by

evidence proving the connection beyond a reasonable doubt." *United States* v. *Cooper*, 567 F.2d at 253. Yet, what the Third Circuit has termed "clearly . . . reversible error" is precisely what was done by the Seventh Circuit in this case.

This case presents an appropriate opportunity for this Court to resolve the conflict among the circuits with respect to the quantum of evidence necessary to connect a defendant to a proven conspiracy. The "presence plus suspicious circumstances" test should be rejected as a patent violation of the Due Process Clause requirement that no person be convicted "except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added); *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979). Knowledge of a conspiracy's essential nature is such a "necessary fact."

In this case, the Court's use of the "presence plus suspicious circumstances" test was particularly inappropriate. Here, the element of knowledge was not simply one among several equally important elements in the government's case. It was the *critical* element, the one which transforms legitimate political assistance into illegal bribery. To utilize a test which, in effect, *presumes* knowledge from proof of other elements of the crime, is to permit the government to dispense with proof of the most important element of its case.

II. The Court's Holding That the Subjective Standard of Recklessness Developed in the First Amendment Libel Context Applies to a Claim Under *Franks* v. *Delaware* Cannot Be Squared With Constitutional and Statutory Principles, Conflicts With Decisions of Other Circuits and With the Reasoning of a Recent Decision of This Court.

In *Franks* v. *Delaware*, 438 U.S. 154 (1978), this Court held that the fruits of a search based on a warrant affidavit

which has been demonstrated to contain intentional or reckless material misstatements must be suppressed. The Fourth Amendment "would be reduced to a nullity," this Court found, if a government affiant could deliberately or recklessly use falsehoods to obtain a warrant, "and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Id.* at 168. The independence of the magistrate's determination of probable cause is so fundamental to the integrity of our legal system that to usurp his function, whether intentionally or recklessly, wreaks an "unthinkable imposition on his authority." *Id.* at 165. The continuing vitality of *Franks* was recently affirmed in *United States* v. *Leon*, 104 S.Ct. 3405 (1984) which stressed that suppression would remain the appropriate remedy for *Franks* violations, although the exclusionary rule would no longer be applied where a facially defective warrant was executed in good faith. *Id.* at 3421.

Since *Franks*, courts have frequently been asked to determine whether or not false statements in search warrant and wiretap affidavits were made with "reckless disregard for the truth." In defining "recklessness," however, the courts have been left strictly to their own devices. As the District of Columbia Circuit recently lamented: "Unfortunately, the Supreme Court in *Franks* gave no guidance concerning what constitutes a reckless disregard for truth in fourth amendment cases, except to state that 'negligence or innocent mistake [is] insufficient'." *United States* v. *Davis*, 617 F.2d 677, 694 (D.C. Cir. 1979). *See also United States* v. *Namer*, 680 F.2d 1088, 1094 (5th Cir. 1982) (*Franks* and its progeny offer "little guidance" in determining recklessness.) In this case, the Court below put its quandary succinctly: "We know what intentional lies are, but the meaning of 'reckless disregard for the truth' is not self-evident, and the Court in *Franks* did not define the concept" (A. 11a). In attempting to fill that gap, courts have adopted conflicting and, in this case, inappropriate definitions.

Having recognized that the *Franks* opinion left a significant concept thus undefined, the Court below noted that the Su-

preme Court "has clarified the notion of reckless disregard in the context of First Amendment cases involving libel" (A. 11a). Without further ado, and without attempting to refute the strong objections made in Petitioner's brief, the Court concluded that "the First Amendment definition should be applied by analogy in the *Franks* setting" (A. 11a). The Court then cited this court's decision in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), for the proposition that "reckless disregard" requires proof that the affiant "in fact entertained serious doubts as to the truth of his" allegations (A. 11a).

Petitioner contends that this "First Amendment" test is wholly inappropriate for evaluating *Franks* claims, and that this Court never intended that it be applied "by analogy" to such claims. Petitioner further contends that, had the court applied an appropriately objective definition of recklessness his motion to suppress would have been granted, or at the very least, the case would have had to be remanded for reconsideration.

The *St. Amant* test focuses on the speaker's subjective state of mind. Unless the libel plaintiff can prove that the defendant *knew* the statement was *probably* false, the publication will not be found to be defamatory. *St. Amant*, 390 U.S. at 731. This test deliberately imposes an extraordinarily difficult burden on a libel plaintiff, but one required by the First Amendment. Because the right to unhindered speech is among our most precious freedoms, any curtailment of that right must be restricted. In the gray area where freedom of speech and other important rights collide, we will tolerate a broad spectrum of misleading statements, and even lies; in short, we choose to err on the side of protecting speech over other interests.[10]

---

[10] This Court has long recognized and upheld the unique status of First Amendment interests. In *Smith* v. *California*, 361 U.S. 147 (1959), Justice Brennan held that where First Amendment interests were at stake, the danger that self-censorship might restrict the free flow of constitutionally protected material was so great that the court must strike down a statute imposing strict liability on a seller of obscene materials, although the insistence on a scienter require-

In formulating the *St. Amant* test, this Court articulated the primacy of First Amendment freedom:

> Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

Id. at 731-732.

In the *Franks* context, the policies behind *St. Amant* simply do not apply. Indeed, they cut in exactly the opposite direction. It is surely not "essential" that courts protect false, misleading, or "erroneous" affidavits. The government's interest in surreptitiously intercepting private communications, even as part of a criminal investigation, is not analogous to a publisher's protected right to speak out about public affairs. The First Amendment to the Constitution mandates the *maximization* of the publisher's "speech," even at the risk of publishing lies, because any restriction on publication might undermine the

---

ment would permit some obscene materials to be sold. "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Id.* at 155, citing *Roth* v. *United States*, 354 U.S. 476, 488 (1957).

public's access to the free flow of ideas. The Fourth Amendment mandates the *minimization* of deliberately or recklessly false or misleading affidavits, even at the risk of acquitting a guilty defendant, because the fraudulent manipulation of magistrates and judges by governmental agents threatens the integrity of the entire judicial system.[11] The number of wiretaps must also be minimized because electronic surveillance intrudes on another fundamental freedom, the Fourth Amendment right to be secure against unreasonable searches and seizures.

This court has clearly articulated the principle that Title III wiretaps should be minimized:

> Congress . . . evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation.

United States v. *Giordano*, 416 U.S. 505, 515 (1974). The Statute imposes restrictive requirements on the use of electronic surveillance, and severe sanctions for non-compliance.[12]

---

[11] *See, e.g., United States* v. *Cortina*, 630 F.2d 1207, 1213-14 (7th Cir. 1980) (deliberately false affidavit commits offense against the integrity of the judicial system, and "a judicial system which condones fraud will be of little value to the individuals whose rights it is sworn to protect.")

[12] The Statute itself, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U.S.C. §§ 2510-2520, is rife with provisions strictly circumscribing the government's "freedom to wiretap." Wiretap applications must contain prescribed information, 18 U.S.C. § 2518(1), the judge must make certain findings before any order may issue 18 U.S.C. § 2518(3), only the Attorney General or a specially designated Assistant Attorney General may seek a wiretap, 18 U.S.C. § 2516(1), orders must be particularized, 18 U.S.C. § 2518(4), and will expire after at most 30 days, 18 U.S.C. § 2518(5), surveillance must be judicially supervised, 18 U.S.C. § 2518(6), agents must comply with minimization obligations, 18 U.S.C. § 2518(5), and face suppression for non-compliance, 18 U.S.C. § 2518(10)(a).

In adopting the *St. Amant* test, the court below ignored the obvious conflict between First Amendment policies, on one hand, which tolerate and even encourage the publication of information which may be false, and *Franks* v. *Delaware*, Fourth Amendment, and Title III policies on the other, which discourage — indeed condemn — the submission to the magistrate of false and misleading warrant affidavits.[13]

The opinion below also fails to recognize that libel suits and *Franks* hearings differ essentially with respect to the subject of the inquiry. In *St. Amant*, this Court approved inquiries into a libel defendant's subjective intent; in *United States* v. *Leon*, *supra*, however, this Court squarely rejected the appropriateness of such inquiries when the subject is a law enforcement officer:

> [W]e believe that "[s]ending state and federal courts into the minds of police officers would produce a grave misallocation of judicial resources." (citations omitted). Accordingly, our good faith inquiry is confined to the *objec-*

[13] The inappropriateness of placing Petitioner in the shoes of a libel plaintiff is further demonstrated by the procedural differences between the two. At a *Franks* hearing, the claimant need only prove his case by a preponderance of the evidence, *Franks* v. *Delaware*, 438 U.S. at 156. In a libel case, the interests of the First Amendment require the plaintiff to prove defendant's knowledge or recklessness by clear and convincing evidence. *New York Times* v. *Sullivan*, 376 U.S. 254, 280 (1964). Even if the libel plaintiff wins, on appeal, the defendant is entitled to an independent review of the entire record to assure protection of First Amendment values. *Bose Corp.* v. *Consumers Union*, 104 S.Ct. 1949, 1965 (1984). In contrast, rulings on motions to suppress are ordinarily reversed only if "clearly erroneous." 3 Wright, Federal Practice & Procedure, Criminal 2d. § 678 at 805 (1982); *United States* v. *Ganter*, 436 F.2d 364, 368 (7th Cir. 1970). First Amendment interests, which oppose libel plaintiffs, require them to run an extraordinarily difficult race from first to last. Fourth Amendment interests, which *Franks* claimants set out to vindicate, mandate a more negotiable course.

Petitioner strenuously objects to the use of the First Amendment standard in this case. If this court should hold, however, that the standard is appropriate, petitioner wishes to join in the claim of his co-defendant, Roy Williams, that under *Bose Corp. supra*, the court below should not have applied the "clearly erroneous" standard of review.

> *tively ascertainable question whether a reasonably well-trained officer would have known* that the search was illegal despite the magistrate's authorization.

Id. at 3421 n.23 (emphasis added). The *Leon* decision repeatedly emphasized that it was setting a standard of *objective* good faith, determinable from an examination of "all of the circumstances" surrounding the case. *Id.* at 3420 n.20, 3421 n.23. Indeed, the Court held out the objective standard as an incentive to law enforcement officials to conform their conduct to a higher standard than would be required if subjective sincerity were sufficient to foreclose all Fourth Amendment claims. *Id.* at 3420 n.20. The decision of the Court below, rendered prior to this Court's decision in *Leon*, cannot be squared with this Court's stated reluctance to permit inquiries into the subjective state of mind of police officers.[14]

The opinion below conflicts not only with this Court's objective approach in *Leon*, but with the approach taken by other courts of appeal. In *United States* v. *Namer*, 680 F.2d 1088 (5th Cir. 1982), for example, the Fifth Circuit employed an objective approach in its analysis of defendant's *Franks* claim, focusing on the misleading effect of the affidavit and on the circumstances surrounding the investigation rather than on the

---

[14] Had the court sought an appropriately objective definition of "recklessness" it might have looked to the law governing material misrepresentations in securities cases. An investor's right to make an informed, independent investment decision parallels the magistrate's right independently to assess probable cause. In both cases, the risk is that a recklessly misleading document will undermine the reader's ability to judge for himself; the standard therefore discourages rather than encourages misleading statements.

Liability is imposed for material misstatements made with reckless disregard for truth. Reckless conduct "represents an extreme departure from the standard of ordinary care, and which presents a danger of misleading . . . that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp.* v. *Sun Chemical Corp.* 553 F.2d 1033, 1045 (7th Cir. 1977). The focus is not on knowledge that the statement is false but knowledge that it is misleading.

affiant's subjective state of mind. The *Namer* opinion focuses on the meaning of "recklessness," but does not look to First Amendment cases for elucidation. Instead, the court noted that "the analytical concepts of materiality and recklessness are often bound together," and then proceeded to analyze the materiality of the misstatement in the context of the particular investigation. *Id.* at 1094. Where the misrepresentation "was a crucially material one," where the affidavit was drafted at leisure, by experienced officers as part of a lengthy investigation, and where a crucial word was used despite its obviously misleading connotations, the court concluded that the misstatement "was made, at least, with reckless disregard for the truth." *Id.* at 1094.[15] The opinion thus determined the affiant's intent using external, objective criteria.

This case presents an excellent opportunity for this Court to elucidate an important concept left undefined in *Franks*, namely, the meaning of the phrase "reckless disregard for truth." Because the court below applied the wrong definition, the convictions should be reversed. Because the evidence is clear that, under the correct standard, government agents would be found to have acted in reckless disregard for truth, Petitioner's

---

[15] In *Namer*, the affiant alleged that a state official had "advised" that certain loans "are classified as securities" when in fact, as the affiant knew, the official had given only an informal opinion as to probable classification. The Court squarely rejected the affiant's contention that the words of the affidavit were technically true and therefore not in violation of *Franks*. "The word 'classified' connotes the authoritative result of ordered procedures and methodologies, not an ad hoc and qualified oral opinion of a single agency employee. The affidavit's statement is no less a misrepresentation because it manipulates the facts subtly." *Id.* at 1094. In the instant case, the allegation that certain calls "concerned" the Aladdin carried a similarly misleading connotation. Under an appropriate analysis, the affidavit would not have been saved by the agent's assertion that he privately believed the calls "concerned" hidden interests because any suspicious or ambiguous conversation might eventually be linked to the hidden interest investigation. A common-sense reading of the affidavit would necessarily induce a belief that the calls *directly* concerned hidden interests in the Aladdin. Had the correct analysis been used, the tenuous "linkage" theory would have been rejected, the misleading effect of the affidavit on the judge would have been recognized, and the result would have been suppression.

motion to suppress should be granted. In the alternative, at the very least, the case should be remanded for consideration under the correct standard.[16]

III. The Court Below Misinterpreted This Court's Decisions Defining the Parameters of the "Plain View" Doctrine.

The Court of Appeals held that under the "plain view" doctrine, the government could properly introduce thirty-three conversations recorded by government agents before they knew of or suspected the alleged conspiracy to bribe Senator Cannon (A. 18a). At the time the conversations were recorded, the agents were operating under a wiretap warrant authorizing only the seizure of evidence relating to Dorfman's purported "hidden interests" in Las Vegas casinos.

The Court rejected defendants' claim that, because the incriminating nature of the conversations was not apparent as of the time they were "seized" and recorded, they could not properly be subjected to subsequent review and analysis, or to introduction at trial.[17] The Court held that once the agents were "lawfully in a position to observe" the conversations, all privacy interest in them was lost and the government could make whatever subsequent use of them it wished (A. 18a). Further, the Court doubted whether the plain view doctrine was applicable at all to electronic interceptions of conversations (A. 17a). The Court below misapprehended both the essential nature of the plain view doctrine and this Court's opinion in *Illinois* v. *Andreas*, 103 S.Ct. 3319, 3324 (1983).

Under this Court's recent decision in *Texas* v. *Brown*, 460 U.S. 730 (1983), an item in plain view may be seized only

---

[16] See footnote, 13, *supra*.

[17] On appeal, Petitioner Lombardo adopted in his brief all arguments of co-defendants which were applicable to his case. The thirty-three conversations at issue include two to which Petitioner was a party, and numerous others introduced against him to prove the existence of the conspiracy.

if, *as of the time of seizure*, there is probable cause to associate the item with criminal activity. 460 U.S. at 741-742. The probable cause requirement was not eliminated by *Illinois* v. *Andreas, supra*. There, the court held that "once a container *has been found to a certainty* to contain illicit drugs," it is like an object seized within the plain view doctrine, and a subsequent search of the container invades no privacy interest of the owner. 103 S.Ct. at 3324 (emphasis added). The permissibility of the search does not depend solely on the object's visibility to the police; rather, it is premised on the combination of visibility and apparent criminality which together constitute "plain view."

The opinion below ignored the "probable cause" element of the plain view doctrine when it held that government agents could not simply record the conversations, but review, analyze, and introduce them despite their apparent innocence as of the time of seizure.

If the court below were correct, the plain view doctrine would be eviscerated, and the particularity requirement of the Warrant Clause eliminated. So long as an officer could obtain a warrant — any warrant — he could obtain entry to the premises or access to the conversations of his target, and then seize every single object he came across in hopes that later analysis would reveal something illegal, regardless of the connection of that something to the charges specified in the warrant.

The decision of the court below permitting the seizure and later analysis of evidence which does not on its face present obvious evidence of criminality also conflicts with decisions of other circuits holding that the incriminating nature of the evidence must be immediately apparent. *United States* v. *Wright*, 667 F.2d 793, 799 (9th Cir. 1982); *United States* v. *Clark*, 531 F.2d 928, 932 (8th Cir. 1976); *United States* v. *Gray*, 484 F.2d 352, 356 (6th Cir. 1973) *cert. denied* 414 U.S. 1158 (1974).

IV. The Court of Appeals Erred in Upholding the March 1 Extension Application Despite the Application's Failure to Include a Statement of Results as Required by 18 U.S.C. § 2518(1)(f).

Defendants argued to both the District Court and the Court of Appeals that the March 1, 1979 extension application was invalid because it failed to include "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results," as required by 18 U.S.C. § 2518(1)(f).[18] Both courts found that the March 1 application did not contain the statutorily-required statement.[19] Both Courts upheld the validity of the March 1 application, however, on the ground that it could have qualified as an original application rather than an extension (A. 10a, 81a).

That holding squarely conflicts with this Court's decision in *United States* v. *Giordano*, 416 U.S. 505 (1974). In that case, an extension application was invalidated where it included a statement of results which was dependent on evidence illegally obtained pursuant to the initial order. The court emphasized that "[*h*]*ad* [*the statement of results*] *been omitted no extension order at all could have been granted.*" *Id.* at 532 (emphasis added).

In dissent, Justice Powell took precisely the position espoused by the court below, arguing that the extension application should have been upheld because it contained sufficient untainted evidence to have supported approval as an original grant. The majority squarely rejected this argument, holding:

---

[18] On Appeal, Petitioner Lombardo adopted in his brief all arguments of co-defendants which were applicable to his case. The March 1 wiretap authorization specifically named petitioner as a target whose conversations were sought to be overheard. At trial, fourteen conversations recorded as a result of the March 1 authorization were introduced.

[19] The District Court held: "The government's application did not contain the required explanation" (A. 78a). The Court of Appeals held: "There is a good reason to doubt that the brief reference to Dorfman's absence was sufficient to satisfy 18 U.S.C. § 2518(1)(f)" (A. 9a).

> But whether or not the application, without the facts obtained from monitoring Giordano's telephone, would independently support original wiretap authority, the Act itself forbids extensions of prior authorizations without consideration of the results meanwhile obtained.

Id. at 533.

The court below ignored this holding. The statement of results is a critical link in the statutory scheme of the Wiretap Act. If the required statement may be dispensed with or omitted at the government's whim, then every application may be treated as an initial one, regardless of how many months of unproductive wiretapping have already elapsed. Judicial supervision of continuing wiretap operations, provided for by statute, would be meaningless. There would be no way to evaluate continuing wiretap operations, or to terminate protracted but unsuccessful ones. This Court recognized the importance of the statement of results in *Giordano*; the judgment below should be reversed for its failure to comply with that decision.

Conclusion.

This case strikingly presents the question whether in a prosecution for conspiracy to bribe, the government must prove that one defendant who knows that something of value is being offered to a Senator must also know that other defendants illegally intend to use that something as an inducement to influence the Senator's official actions. The case also presents an appropriate opportunity for this Court to define the phrase "reckless disregard for truth" left open by its decision in *Franks* v. *Delaware*.

It is a central irony of this case that the Petitioner is currently imprisoned and serving a fifteen year sentence based on a *lower* standard of knowledge than that imposed by the court below on the governmental agents who submitted the misleading wiretap affidavits. This Court should grant the Writ of Certiorari to decide the important questions of law and conflicts among the circuits presented herein.

Respectfully submitted,

ALAN M. DERSHOWITZ,
Counsel of Record,
232 Brattle Street,
Cambridge, Massachusetts 02138.
(617) 661-1965

Of Counsel:
LAURA J. HANFT,
NATHAN Z. DERSHOWITZ,
VICTORIA B. EIGER,
JUDITH A. HALPRIN.

Office - Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-585

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the district court applied an incorrect standard to determine that statements in a warrant application were not intentionally false or made with reckless disregard of the truth.

3. Whether electronically intercepted conversations that were evidence of bribery are inadmissible because they were obtained by agents while lawfully executing a warrant that authorized the interception of conversations pertaining to another offense.

4. Whether evidence obtained pursuant to an extension of a warrant authorizing a wiretap must be suppressed on the ground that the application for the extension was insufficient, even though the application established probable cause and any defects in it tended to diminish, not increase, the likelihood that a warrant would issue.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Franks v. *Delaware*, 438 U.S. 154	11, 13, 14
Glasser v. *United States*, 315 U.S. 60	6
New York Times Co. v. *Sullivan*, 376 U.S. 254	13
St. Amant v. *Thompson*, 390 U.S. 727	12
United States v. *Ceccolini*, 435 U.S. 268	6
United States v. *Cooper*, 567 F.2d 252	5
United States v. *Dalzotto*, 603 F.2d 642, cert. denied, 444 U.S. 994	4, 6
United States v. *Doe*, No. 82-786 (Feb. 28, 1984)	6
United States v. *Dunn*, 564 F.2d 348	5
United States v. *Malatesta*, 590 F.2d 1379, cert. denied, 444 U.S. 846	6
United States v. *Namer*, 680 F.2d 1088	14

Constitution and statutes:

U.S. Const.:	
Amend. I	12, 13
Amend. IV	13
18 U.S.C. 201(b)	9
18 U.S.C. 201(f)	9
18 U.S.C. 371	2
18 U.S.C. 1343	2
18 U.S.C. 1952	2
18 U.S.C. 2518(1)(f)	15

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-585

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a)[1] is reported at 737 F.2d 594. The opinion of the district court denying petitioner's motion to suppress evidence (Pet. App. 44a-131a) is reported at 542 F. Supp. 345.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41a) was entered on June 8, 1984. A petition for rehearing was denied on July 12, 1984 (Pet. App.

---

[1] "Pet. App." refers to the appendix to the petition in No. 84-256. See Pet. 5 n.2.

42a-43a). On August 24, 1984, Justice Stevens extended the time for filing a petition for a writ of certiorari to October 10, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on all 11 counts of an indictment charging conspiracy to bribe a United States Senator, in violation of 18 U.S.C. 371; interstate travel to promote the bribery, in violation of 18 U.S.C. 1952; and wire fraud, in violation of 18 U.S.C. 1343 (Pet. App. 1a). He was sentenced to a 15-year term of imprisonment, to be followed by five years' probation, and fined $29,000. The court of appeals affirmed (Pet. App. 1a-40a).

Petitioner, together with co-defendants Roy L. Williams, Thomas F. O'Malley, Andrew G. Massa, and Allen Dorfman, all of whom were convicted on all 11 counts of the indictment, and unindicted co-conspirator William Webbe, devised and pursued a scheme to bribe Senator Howard Cannon of Nevada. The convictions of Williams, O'Malley, and Massa were affirmed. (Dorfman was killed prior to sentencing, and his case was dismissed as moot.) Williams (in No. 84-256) and O'Malley and Massa (in No. 84-292) have sought certiorari. Our consolidated response to their petitions (at 4-7) describes the evidence adduced at the suppression hearing and at trial.[2]

---

[2] A copy of that brief in opposition has been served on counsel for petitioner.

ARGUMENT

1. Petitioner's principal contention (Pet. 8-15) is that the evidence was insufficient to support the verdict against him. Petitioner attempts to present this contention as a claim that the court of appeals applied a legal standard that is erroneous, that conflicts with the decisions of other courts of appeals, and that deprived petitioner of his right to have the charges against him proved beyond a reasonable doubt. In fact, however, the court of appeals did not apply any arguably erroneous legal standard; it simply reviewed the sufficiency of the evidence and correctly concluded that it was "ample" to support petitioner's conviction (Pet. App. 36a).

a. The court of appeals began its analysis by stating that "[a] person is not a co-conspirator, of course, if he is unaware of the 'essential nature' of the conspiracy" (Pet. App. 35a). In this connection, the court of appeals further stated (*id.* at 37a; citations omitted):

> That the word "deregulation" was not used in [petitioner's] conversations is of no moment. A co-conspirator need not know the details or every objective of the conspiracy. Knowledge of the conspiracy's essential nature or the "kind of criminal conduct . . . in fact contemplated," is sufficient.

Petitioner does not assert that any of these propositions constitutes an incorrect statement of the law. See Pet. 9 n.3, 11 n.5.

Instead, petitioner seizes on the court of appeals' remark that " '[p]resence has been sufficient evidence of knowing participation in a conspiracy when there were suspicious circumstances, and the existence of the conspiracy was already established.' " Pet. App.

36a, quoting *United States* v. *Dalzotto*, 603 F.2d 642, 645 (7th Cir.), cert. denied, 444 U.S. 994 (1979). Petitioner asserts that the court of appeals intended this passage to establish a "test"—what petitioner repeatedly calls "the 'presence plus suspicious circumstances' test" (Pet. 8; see *id.* at i, 9, 10, 13-14, 15). Petitioner attempts to equate this "test" with the view, stated by some courts, that "slight evidence" of a defendant's involvement in a conspiracy is enough to support a guilty verdict on a conspiracy charge (see *id.* at 8-9, 13-14). He then asserts that the "slight evidence" test has been rejected by several courts of appeals and is inconsistent with the principle that every element of an offense must be proved beyond a reasonable doubt (see *id.* at 8-9, 14-15).

In fact, the court of appeals' statement that a conspiracy can be established by showing presence combined with suspicious circumstances is not a "test" at all but a somewhat obvious truism: if the circumstances are sufficiently suspicious, then of course "presence plus suspicious circumstances" can support a conviction for conspiracy. The court of appeals never used the phrase "slight evidence" or applied a "slight evidence" test; on the contrary, as we noted, the court of appeals expressly found "ample" evidence to support the verdict (Pet. App. 36a).[3] Accordingly,

---

[3] We do not dispute the proposition that it would be error to instruct a jury that it can convict a defendant of conspiracy on the basis of "slight evidence" rather than evidence that shows guilt beyond a reasonable doubt. But the jury instructions in this case (at 42-43) specifically required the jury to find the defendants guilty of conspiracy beyond a reasonable doubt; petitioner did not challenge those instructions at trial and he does not challenge them now. Petitioner's assertion (Pet. 15) that "what the Third Circuit has termed 'clearly . . . reversible error' is precisely what was done by

petitioner errs in asserting that the court of appeals applied a standard of review that is incorrect or that differs from the approach of other courts of appeals.

---

the Seventh Circuit in this case" is therefore wrong; the Third Circuit's statement was: "Clearly, it would be reversible error *to charge a jury* that, once the government has shown the existence of a conspiracy, it may connect a particular defendant to it by 'slight evidence', rather than by evidence proving the connection beyond a reasonable doubt." *United States* v. *Cooper*, 567 F.2d 252, 253 (1977) (emphasis added).

Moreover, any seeming disagreement among the courts of appeals over the so-called "slight evidence" rule is more apparent than real. Indeed, several of the court of appeals decisions that petitioner cites (Pet. 14) as rejecting the "slight evidence" rule have not overruled circuit precedent applying the rule but have simply explained that the rule is a (perhaps infelicitous) way of phrasing well-recognized legal principles. See, *e.g.*, *United States* v. *Dunn*, 564 F.2d 348, 350-357 (9th Cir. 1977). For example, in *United States* v. *Cooper*, *supra*, the court of appeals decision on which petitioner most heavily relies (see Pet. 14-15), the Third Circuit explained the innocuousness of the "slight evidence" rule as follows (567 F.2d at 253; footnote omitted):

> [S]ome recent Third Circuit decisions * * * do refer to "slight evidence," but they cannot be understood to establish the novel rule that the prosecution in a conspiracy case is relieved of the burden of proving every element of the offense beyond a reasonable doubt. * * *
>
> The reference to "slight evidence" in the cases cited * * * is no more than a shorthand expression of the rule that, after a guilty verdict by a jury or a finding of guilt by a trial court, an appellate tribunal may not substitute its inferences from the evidence for those drawn by the factfinder, if there was sufficient evidence to submit to the factfinder in the first place. * * * As we observed in *United States* v. *Kates*, 508 F.2d 308, 310-11 (1975), to convict a defendant of participating in a conspiracy, there must be *some* evidence tending to prove that he entered into an agreement and that he knew the agree-

b. Petitioner is, therefore, actually challenging not the standard that the court of appeals applied but its result; petitioner's claim is simply that the evidence was not sufficient to support his conviction. See Pet. 10-13. This Court does not ordinarily consider such fact-bound claims. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978). But in any event, the court of appeals' ruling was clearly correct.

Tape recordings of five conversations in which petitioner participated were admitted into evidence. In the conversations of January 30 and February 2, 1979 (C. A. App. 1-10, 15-24),[4] petitioner, Webbe, Dorfman, and Massa talked in guarded language about the trip that O'Malley and Massa took on January 30 to persuade Glick to withdraw his bid on the

---

ment had the specific unlawful purpose charged in the indictment.

So understood, of course, the "slight evidence" rule is no more inconsistent with the requirement of proof beyond a reasonable doubt than is this Court's statement that "[t]he verdict of a jury must be sustained if there is *substantial* evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942) (emphasis added); see *United States* v. *Malatesta*, 590 F.2d 1379, 1381-1382 (5th Cir.) (en banc), cert. denied, 444 U.S. 846 (1979).

Since the "slight evidence" rule is a matter more of phraseology than of substance, and since the court below did not mention "slight evidence" and expressly found "ample evidence," it is of no consequence that some prior Seventh Circuit cases have nominally applied the "slight evidence" rule. See, *e.g.*, *Dalzotto*, 603 F.2d at 645.

[4] "C.A. App." refers to the appendix filed by the government in the court of appeals.

Wonderworld property. In his January 30 conversation with Dorfman, petitioner said that "the man" had said that Williams should "handle it," referring to the proposed effort to persuade Glick to withdraw his bid, because Williams was "the guy that okayed it" (*id.* at 5-6). Dorfman and petitioner then discussed who should make the trip to see Glick. Petitioner said that "someone on the Pension Fund has to go talk to [h]im" because "they okayed it, and they gave you the ah guarantee" (*id.* at 7-8). When Dorfman agreed that someone from the Pension Fund should handle the approach to Glick, petitioner proposed O'Malley and Massa (*id.* at 8). Petitioner added, however, that Williams would first have to give his approval (*id.* at 9).

On February 2, after the successful O'Malley-Massa trip, Webbe reported to petitioner that Glick was "willing to back off" (C. A. App. 17). Petitioner exclaimed "Beautiful * * * No kiddin['] * * * No kiddin[']" (*ibid.*) and claimed credit for the suggestion to have O'Malley and Massa approach Glick (*id.* at 21-22). Webbe added that Glick had said that "if he knew what it was all about from the beginning he would of never gotten involved in it" (*id.* at 17). At one point during the conversation, petitioner said to Webbe: "Just don't mention names, ya know what I mean?" (*ibid.*). At the conclusion of the conversation, petitioner directed Webbe to "stay right on top of it," and Webbe responded that he would "let you guys know out there the minute everything is completed" (*id.* at 23-24).

On May 17, Dorfman was overheard in his office complaining to petitioner about the way the Pension Fund assets were being managed. In particular, Dorfman complained that the asset managers

were not paying attention to the Teamster leaders. Petitioner responded, "You got a, you got an example with Palmieri. With the Cannon deal." C.A. App. 194; Pet. App. 36a-37a. Petitioner and Dorfman then engaged in a discussion of the frustrations that had plagued the efforts to steer the Wonderworld property to Senator Cannon's group (C.A. App. 194-195).

Five days later, petitioner and Massa were with Dorfman in his office when Dorfman engaged in a lengthy discussion of the failure to fulfill the commitment to Senator Cannon (C.A. App. 241-242). For example, Dorfman remarked (*id.* at 242): "I'm gonna call the Senator, tell him as far as I'm concerned, Senator, I, there is nothing I can do about it anymore. It's out of my hands. If he wants to go for the [expletive] deal, let him go for the deal." From the tone and context of Dorfman's comments, the jury could readily infer that Dorfman was talking to people who were already well acquainted with the background of the transaction.

Finally, in January 1980, petitioner participated in a discussion with Dorfman, O'Malley, and Massa concerning what they suspected was a federal investigation of the Wonderworld transaction. Massa expressed great concern about the investigation, saying that he and O'Malley were in particular jeopardy because "we took a trip to California" (C.A. App. 268). Dorfman and petitioner then made suggestions about how to respond to the investigation. Dorfman proposed an exculpatory story (*ibid.*), and petitioner suggested that they should feign lack of memory (*id.* at 269).

Certain facts are immediately clear from these conversations. First, petitioner was deeply involved in attempting to persuade Glick to withdraw his bid.

Indeed, petitioner supervised much of this aspect of the scheme; for example, he proposed that O'Malley and Massa travel to California for that purpose. Second, petitioner knew that the purpose of approaching Glick was to ensure that the property would be steered to Senator Cannon. Indeed, petitioner appears to concede that the evidence sufficiently demonstrated these points. See, *e.g.*, Pet. 13.

The evidence was also more than sufficient to justify the jury's finding that petitioner knew that the property was being steered to Senator Cannon for an illegal purpose. Petitioner spoke in guarded terms; he cautioned Webbe not to use names; and, most significantly, he counselled O'Malley and Massa to feign loss of memory in order to subvert a possible federal investigation. Petitioner suggests (Pet. 12-13 & n.7) that this evidence shows only that he was making a campaign contribution that he wished to keep secret. Petitioner was certainly free to argue to the jury that, although he believed he was making a lawful payment, he was so concerned with secrecy that he was prepared to engage in obstruction of justice; but it was hardly irrational for the jury to conclude otherwise.

The jury accordingly had abundant evidence from which to determine that petitioner furthered a scheme to make an illegal payment to Senator Cannon. Petitioner's response (Pet. 11 & n.6) appears to be that while this evidence may have been sufficient to support a conviction for conspiracy to give an illegal gratuity, in violation of 18 U.S.C. 201(f), it was not sufficient to support a conviction for conspiracy to commit bribery, in violation of 18 U.S.C. 201(b), because petitioner "*did not know* that the conspirators intended to obtain specific legislative

support from the Senator in exchange for the assistance" (Pet. 13). But there was ample evidence from which the jury could have concluded that petitioner was well aware of the nature of the scheme. Petitioner's statement that Williams should approve the choice of O'Malley and Massa envinced an awareness of Williams's concern that the property be successfully steered to Senator Cannon—a concern that grew out of Williams's interest in deregulation. Webbe's statement to petitioner about Glick's reaction to the O'Malley-Massa mission—that Glick had said that he would not have bid on the property "if he knew what it was all about"—was evidence that petitioner also "knew what it was all about." Petitioner's ability to discuss the transaction without using names demonstrated an intimate familiarity with the scheme.

In addition, the jury was persuaded beyond a reasonable doubt that Dorfman, Williams, O'Malley, and Massa all knew the purpose of the scheme. They heard Dorfman, in particular, and Webbe discuss the scheme with petitioner in a way that strongly suggested that the other conspirators were not holding anything back from petitioner and that he was a full participant in the scheme. Petitioner never expressed confusion or uncertainty about the nature of the scheme, and his co-conspirators did not give the slightest indication that they were concealing any aspect of the scheme from petitioner. Indeed, petitioner was not a subordinate figure in the conspiracy; he dictated to Dorfman that O'Malley and Massa would be used as emissaries to Glick. In these circumstances, the jury was certainly entitled to conclude that petitioner knew the "essential nature" of the scheme.

2. Petitioner, like Williams, O'Malley, and Massa (see 84-256 Pet. 14), contends that some of the electronically overheard conversations should not have been admitted into evidence because the affidavit supporting the application for the March 1, 1979, order authorizing an extension of the interception contained a statement that proved to be erroneous. Specifically, as we explained in our brief in opposition in Nos. 84-256 and 84-292 (at 3-4, 14), the affidavit, executed by FBI Special Agent Wacks, stated that some conversations overheard during earlier surveillance concerned the "promotion and management of hidden and unlawful financial interests in the Aladdin hotel-casino" (Pet. 10a), when in fact those conversations concerned the conspiracy to bribe Senator Cannon (*ibid.*).

Under *Franks* v. *Delaware*, 438 U.S. 154, 171 (1978), the fact that erroneous statements are included in a search warrant affidavit is not a justification for suppressing evidence obtained pursuant to the warrant unless the statements are intentionally false or made with reckless disregard for the truth. After conducting a hearing, the district court, in a detailed discussion, rejected the defendants' contention that *Franks* required the suppression of the intercepted conversations (Pet. App. 77a-90a). The district court discussed the applicable legal principles as follows (*id.* at 67a-68a):

> *Franks* provides little guidance as to what constitutes "reckless disregard for the truth." A useful analogy, however, is provided by the principle of first amendment law that liability for a defamatory statement regarding a public figure cannot be imposed unless the plaintiff proves that the defendant acted with reckless disregard for the truth * * *.

> [T]his branch of first amendment law * * * indicates that the reckless disregard for truth required by *Franks* is not established by a mere failure to investigate. Rather, it can only be demonstrated if [petitioner] can establish that the government in fact entertained serious doubts as to the truth of the affidavits or had obvious reasons to doubt the accuracy of the information contained therein.

The court of appeals agreed that the district court had applied the correct legal principles and upheld its determination as not clearly erroneous (*id.* at 11a-15a), concluding that the intercepted "conversations by themselves could have led a reasonable person to conclude that Allen Dorfman and his associates were involved in an effort to acquire, promote, or manage a hidden interest in the Aladdin hotel-casino. And Special Agent Wacks' investigation revealed further facts to support such a thesis." *Id.* at 12a.

Williams, O'Malley, and Massa did not object to the definition of "reckless disregard for the truth" that was employed by the district court; they claimed only that the court of appeals was excessively deferential in applying the clearly erroneous standard to the district court's ruling. See 84-256 U.S. Br. in Opp. 15-16. By contrast, petitioner contends (Pet. 15-23) that the district court erred in drawing an analogy between *Franks* and such First Amendment cases as *St. Amant* v. *Thompson*, 390 U.S. 727, 731-732 (1968), that define the showing a public figure must make in order to recover for defamation.

As we have noted (see 84-256 U.S. Br. in Opp. 16), neither the district court nor the court of appeals considered it a close or difficult question whether Special Agent Wacks's statement was intentionally false

or made with reckless disregard of the truth. See Pet. App. 11a-15a, 72a-90a. Thus it seems likely that the courts below would have rejected petitioner's claim under any plausible definition of "reckless disregard of the truth."

But in any event, the analogy to the First Amendment cases was entirely appropriate. Petitioner discusses at length various First and Fourth Amendment policies and attempts to argue that the standard for determining whether a public figure can recover for libel should not be the same as the standard for determining whether false statements in a search warrant affidavit require suppression of evidence obtained pursuant to the warrant. See, *e.g.*, Pet. 17-20. But this contention is foreclosed by the decisions of this Court: the Court has already determined that a standard of "reckless disregard of the truth" is to apply in both contexts. Compare *Franks*, 438 U.S. at 155-156 (a defendant seeking to have evidence suppressed must make a "showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit") and *id.* at 171 ("There must be allegations of deliberate falsehood or of reckless disregard for the truth") with *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (public official plaintiff must prove "that the statement was made * * * with knowledge that it was false or with reckless disregard of whether it was false or not"). "Recklessness" is a familiar notion in the law, and this Court determined that requiring a showing of recklessness would strike the proper balance among the competing considerations in both the First Amendment area and the *Franks* area. Petitioner's

arguments demonstrate no more than that he would strike the balance differently.[5]

Finally, we note that while petitioner challenges the definition of "reckless disregard of the truth" used by the courts below, he is unable to offer an alternative. Petitioner insists (Pet. 20-22) that an "objective" standard should be applied, but he fails to explain why the standard used by the district court—that a statement was made with reckless disregard for the truth if the affiant "had obvious reasons to doubt the accuracy of the information contained therein" (Pet. App. 68a)—is insufficiently "objective." The only specific definition of recklessness that petitioner proposes (Pet. 21 n.14) is neither obviously different from that used by the courts below nor obviously more favorable to the defense.[6]

3. Petitioner contends (Pet. 23-24), as did his coconspirators in Nos. 84-256 and 84-292, that the district court should have suppressed the contents of 33 conversations overheard pursuant to court orders before April 28, 1979, the date of the first application that alleged a conspiracy to bribe Senator Cannon.

---

[5] In addition, in contending that "[t]he government's interest in surreptitiously intercepting private communications * * * is not analogous to a publisher's protected right to speak out about public affairs" (Pet. 18), petitioner ignores the considerations that militate against allowing suppression of evidence to be used as a remedy for a false warrant affidavit—considerations that this Court carefully canvassed in *Franks* and concluded were substantial (438 U.S. at 165-167).

[6] Petitioner asserts (Pet. 21-22 & n.15) that the decision below conflicts with *United States* v. *Namer*, 680 F.2d 1088 (5th Cir. 1982). But in *Namer* the court of appeals simply concluded, on the particular facts of the case, that the affiant had shown a reckless disregard for the truth; nothing in *Namer* suggests that the Fifth Circuit would have disagreed with the court below on the facts of this case.

Petitioner argues that the orders did not authorize the recording of these conversations and that the conversations were not so obviously incriminating that they can be analogized to physical evidence that can be seized if found in plain view. The court of appeals correctly rejected this contention (Pet. App. 15a-19a), and as we show in our brief in opposition in Nos. 84-256 and 84-292 (at 7-11), further review of this issue is not warranted.

4. Petitioner has also raised (Pet. 25-26) the argument made by his co-conspirators in Nos. 84-256 and 84-292 that the government's first application for an extension of its wiretap authorization, filed on March 1, 1979, was invalid because it did not include the explanation required by 18 U.S.C. 2518(1)(f). In our brief in opposition in Nos. 84-256 and 84-292 (at 11-16), we explain why this issue does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

FEBRUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10160

Supreme Court, U.S.
FILED
FEB 11 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-585.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH LOMBARDO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petitioner's Reply Brief.

ALAN M. DERSHOWITZ,
Counsel of Record,
232 Brattle Street,
Cambridge, Massachusetts 02138.
(617) 661-1965

Of Counsel:
LAURA J. HANFT,
JUDITH A. HALPRIN.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Argument 1

I. The government fails to meet petitioner's argument that the court of appeals applied an incorrect and constitutionally impermissible standard to petitioner's sufficiency of the evidence claim 1

II. The government avoids petitioner's *Franks* v. *Delaware* argument by assuming that the term "reckless disregard for truth" has the same meaning in First and Fourth Amendment contexts 5

Conclusion 7

Table of Authorities Cited.

CASES.

Franks v. Delaware, 438 U.S. 154 (1978) 5

Glasser v. United States, 315 U.S. 60 (1942) 4n

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 6

Hutchinson v. Proxmine, 443 U.S. 111 (1978) 6

Jackson v. Virginia, 443 U.S. 307 (1979) 4n

New York Times v. Sullivan, 376 U.S. 254 (1964) 5

St. Amant v. Thompson, 390 U.S. 727 (1968) 5n, 6

Terry v. Ohio, 329 U.S. 1 (1967) 6

United States v. Cooper, 567 F.2d 252 (3d Cir. 1977) 4n

United States v. Dalzotto, 603 F.2d 642 (7th Cir. 1979) 3

United States v. Leon, 104 S.Ct. 3405 (1984) 6

United States v. Walden, 578 F.2d 966 (3d Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) 4n

No. 84-585.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH LOMBARDO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petitioner's Reply Brief.

Argument.

I. THE GOVERNMENT FAILS TO MEET PETITIONER'S ARGUMENT THAT THE COURT OF APPEALS APPLIED AN INCORRECT AND CONSTITUTIONALLY IMPERMISSIBLE STANDARD TO PETITIONER'S SUFFICIENCY OF THE EVIDENCE CLAIM.

The government attempts to dismiss petitioner's first argument as no more than a fact-centered claim of insufficiency of the evidence.

The government's argument patently misconstrues both petitioner's argument and the court of appeals' opinion. The government asserts that the "presence plus suspicious circumstances" standard, articulated and applied by the court of appeals, was actually just a "remark" which the court tossed out, after which it "simply reviewed the sufficiency of the evi-

dence and correctly concluded that it was 'ample' to support Petitioner's conviction" (Br. Opp. 3). This claim, that the court "simply reviewed the sufficiency of the evidence" without reference to any standard, suggests that the court somehow performed its review without employing *any* legal standard. This is obvious nonsense. The court's detailed review of the evidence, which immediately follows its articulation of the standard, clearly measures the evidence against that standard (see A. 35a-37a). That standard — which the government never really tries to defend — was incorrect.

The court's analysis dispenses with the necessity of requiring proof beyond a reasonable doubt that Petitioner *knew* that the alleged conspirators intended to influence the Senator's official acts by assisting him to purchase Wonderworld. It was only by applying that *incorrect* standard that the court could have concluded, as it did, that the evidence against Petitioner was "ample."[1] Petitioner's claim is much more than a quibble about whether or not a particular piece of evidence was sufficiently incriminatory; it is a claim that the court applied a devastatingly incomplete standard, one rejected by five other circuits.

Having thus mischaracterized Petitioner's argument, the government proceeds *as if* sufficiency of the evidence were actually the issue, detailing its version of the evidence and arguing that it was indeed sufficient (Br. Opp. 6-9). The government's lengthy characterizations of Lombardo's telephone calls are irrelevant to the questions before this Court. The court of appeals concluded that "from the secretive nature of the

[1] The government's reliance on the court's finding that the evidence was "ample" (see, e.g., Br. Opp. 3, 4, 10) is clearly misplaced. The "ample" evidence to which the court referred (A. 36a) was clearly the evidence of knowledge that something of value was given to the Senator, *not* evidence that Lombardo knew that a legislative quid pro quo was expected in return. It was only by applying the incorrect standard that the court could conclude that the evidence was "ample"; there is no indication whatsoever that a similar finding would have resulted had the correct standard been applied.

operation (Lombardo told Webbe over the phone, 'Just don't mention names') the jury could infer that Lombardo knew the favor was intended 'to influence an[ ] official act.'" (A. 37a). This was the only evidence adverted to by the court regarding Petitioner's knowledge of the quid pro quo. Thus, the court's finding of sufficiency was premised *solely* on Lombardo's stated wish to remain anonymous. It is not open to the government in reply to a petition for certiorari to inject descriptions of *other* evidence in an attempt to procure new findings of fact more to its taste. The court of appeals reviewed the evidence and described that evidence on which its opinion was based. Had the proper standard been applied, that evidence would have been palpably insufficient.

The government makes much of the fact that the court of appeals' opinion does not explicitly use the term "slight evidence." (Br. Opp. 4). But in adopting the "presence plus suspicious circumstances" standard, the *Lombardo* court relied on and quoted *United States* v. *Dalzotto*, 603 F.2d 642 (7th Cir. 1979). The *Dalzotto* court held that "once the conspiracy is established, even *slight evidence* may suffice to link a particular defendant to the conspiracy." *Dalzotto*, 603 F.2d at 645 (emphasis added). That holding was essential to both the *Dalzotto* and *Lombardo* courts' conclusions that presence plus suspicious circumstances would be sufficient evidence of a particular defendant's knowledge. *See* A. 36a; *Dalzotto*, 603 F.2d at 645.

The government's attempt to trivialize Petitioner's arguments also ignores the major implications this case has for other cases. First, this case presents the Court with an excellent opportunity to resolve a conflict among the circuits with respect to the constitutionality of an important legal rule.[2] Second, and

---

[2] In a footnote, the government attempts, unsuccessfully, to minimize or deny the existence of the conflict among the circuits. First, the government claims

at least as importantly, the court of appeals' opinion in this case creates the frightening possibility that political bribery convictions will be obtainable in the future regardless of whether the government has persuasive proof that the defendant knew that his assistance to a public official (whatever form that assistance might take) was being used by others as part of a scheme to influence official acts. The court of appeals' opinion, as it now stands, makes all political contributors, PACS, or friends of public officials vulnerable to political prosecution and conviction if they associate with persons who bribe public officials, despite the contributor's complete ignorance of the conspiracy to bribe.

---

that *United States* v. *Cooper*, 567 F.2d 252 (3d Cir. 1977), a case which squarely rejects the "slight evidence" rule, is inapposite because it deals with jury instructions, which are not at issue in this case. This argument creates a distinction without a difference. A jury instruction which permits a conviction on less than proof beyond a reasonable doubt is fatally flawed for exactly the same reason and on the same grounds as an appeals court opinion which upholds a conviction where the evidence (with all inferences drawn in favor of the prosecution) does not provide proof beyond a reasonable doubt on each element of the crime. So long as circuit courts of appeals continue to use the "slight evidence" test, *both* courts and juries will apply it.

The government's claim that the conflict between the circuits "is more apparent than real" (Br. Opp. 5 n.3) is equally unpersuasive. The fact that the *Cooper* court found it expedient to reconcile Third Circuit precedent so as to produce a consistent circuit rule says nothing at all about the obvious and persisting conflict between the Third Circuit and other circuits on the same issue.

Finally, the government claims that the "presence plus suspicious circumstances" standard is as innocuous as that enunciated in *Glasser* v. *United States*, 315 U.S. 60 (1942) (Br. Opp. 6 n.3). It is not. So long as the slight evidence rule persists, jurors may be instructed that they can convict a defendant on the basis of slight evidence. *See United States* v. *Walden*, 578 F.2d 966, 971 (3d Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) (jury instruction of this type in trial conducted before *Cooper*). The presence plus suspicious circumstances standard is therefore more like the "mere modicum" standard held unconstitutional in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), than like the "substantial evidence" requirement set out in *Glasser*.

II. THE GOVERNMENT'S AVOIDS PETITIONER'S *Franks* v. *Delaware* ARGUMENT by ASSUMING THAT THE TERM "RECKLESS DISREGARD FOR TRUTH" HAS THE SAME MEANING IN FIRST AND FOURTH AMENDMENT CONTEXTS.

The government makes the unequivocal assertion that this Court "has already determined that a standard of 'reckless disregard for the truth' is to apply in both contexts" (Br. Opp. 13), and follows this assertion with quotations from *Franks* v. *Delaware*, 438 U.S. 154 (1978), and *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), which both use the phrase "reckless disregard for the truth." But this similarity of phraseology is the beginning of Petitioner's inquiry, not the end. The question is not whether the same words are used in both cases, but whether they were intended to carry the same meaning, regardless of context. The government apparently assumes that identity of terminology requires identity of meaning; even a moment's reflection is enough to destroy this contention.

Terms and phrases such as "good faith reliance," "assault," "fraud," or "due process of law" carry widely differing connotations depending on whether the context is civil or criminal, tort or securities, an administrative hearing, civil trial, or criminal trial for a capital offense. The "due process of law" to which a welfare mother is entitled before her benefits are terminated is quite different from the "due process of law" which a person accused of murder must receive before he is convicted and executed. It is entirely appropriate to construe "recklessness" in a First Amendment context so as to require *subjective* bad faith (whether the speaker "*in fact* entertained

---

[1] *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). An important purpose behind this standard in the context of the First Amendment is the recognition that unless "honest mistakes" are protected, the media will be chilled away from vigorous reporting.

serious doubts" about the statement[3]) while defining "recklessness" in the Fourth Amendment context in terms of *objective* bad faith ("whether a reasonably well-trained officer would have known" that the statement was false[4]).

Legal doctrines governing First and Fourth Amendment "good faith" inquiries have always maintained the subjective-objective distinction Petitioner seeks. In libel cases the finder of fact must determine "whether the publication was indeed made in good faith," *St. Amant*, *supra* at 732, an inquiry which "calls a defendant's state of mind into question," *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1978) and in which a defendant's "subjective awareness of probable falsity," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974) is critical. In Fourth Amendment cases, however, "good faith on the part of the arresting officer is not enough. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate. *Terry* v. *Ohio*, 329 U.S. 1, 22 (1967). The stress on objectivity in evaluating a policeman's right to stop-and-frisk was recently reemphasized in a different context in *United States* v. *Leon*, *supra*, in which the Court expressly stated that the "objective good faith inquiry" should "eschew inquiries into the subjective beliefs of law enforcement officers. . . ." 104 S.Ct. at 3421 n.23. It is precisely this distinction which, as Petitioner argued in his brief, should govern the interpretation of "recklessness" in the First and Fourth Amendment contexts.

The government's final contention, that Petitioner was "unable to offer an alternative" to the *St. Amant* test (Br. Opp. 14), is unfounded. Petitioner's brief detailed at length (*see*, *e.g.*, pp. 21-23) the appropriate test: one which measures recklessness in terms of objectively ascertainable facts and circumstances of the case rather than one which focuses on the officers' subjective belief, however unreasonable.

---

[4] *United States* v. *Leon*, 104 S.Ct. 3405, 3421 n.23 (1984).

Conclusion.

For the above-stated reasons, as well as those set out in Petitioner's petition for a writ of certiorari, this Court should grant the Writ to decide the important questions of law raised here.

Respectfully submitted,

ALAN M. DERSHOWITZ,
Counsel of Record,
232 Brattle Street,
Cambridge, Massachusetts 02138.
(617) 661-1965

Of Counsel:
LAURA J. HANFT,
JUDITH A. HALPRIN.